September 12, 2001

(11)

Supreme Court, U.S.
FILED
SEP 12 2001
CLERK

No. 00-1167

In The

Supreme Court of the United States

TAHOE SIERRA PRESERVATION COUNCIL, INC., *ET AL.*,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, *ET AL.*,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE

The Institute for Justice is a nonprofit, public interest law center committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. Central to the mission of the Institute is strengthening the ability of individuals to control and transfer property and demonstrating that property rights are inextricably connected to other civil rights.

The Institute's brief is co-authored with Professor Richard Epstein of the University of Chicago Law School, one of the nation's leading authorities on property law. The Institute also filed along with Professor Epstein *amicus curiae* briefs in *Lucas v. South Carolina Coastal Council*, *Dolan v. City of Tigard*, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, and *Palazzolo v. State of Rhode Island, et al.* before this Court. This brief presents the question of whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the Constitution.

The parties in this case consent to the filing of *amicus curiae* briefs in support of their respective positions and a letter memorializing such consent has been filed with the clerk.[1]

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[1] Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amicus curiae* Institute for Justice, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

ABBREVIATED STATEMENT OF THE CASE

Owing to the limited scope of this Court's grant of certiorari, it is not necessary to rehearse in any detail the ins and outs of this modern version of Bleak House, in which the actions of regional planning commissioners made the nineteenth-century English Probate Court appear the model of dispatch. All the plaintiffs in this suit are landowners of undeveloped plots of land located in the Lake Tahoe Basin. For nearly twenty years, they have fought an incessant battle with the Tahoe Regional Planning Agency (TRPA), which under a series of strategically timed development moratoria has refused to allow the construction of any new single-family homes on ordinary building plots located in the basin. At no time has TRPA simply and publicly acknowledged its evident mission, which is to achieve an indefinite and selective moratorium on new construction through a series of temporary restraints.

TRPA's prime justification for its steadfast refusal to permit development relates to the preservation of the pristine condition of Lake Tahoe. Owing to its high altitude and location, Lake Tahoe was in its natural state "oligotropic," which means that the Lake lacked the nutrients to support the growth of plant life. In consequence the Lake enjoyed a matchless clarity that has been long celebrated by Mark Twain and the citizens who live and work in the region. Owing to the development that has already taken place within the area, however, Lake Tahoe has undergone a process of "eutrophication" whereby plant life has flourished in the Lake, undermining its clarity. The source of that eutrophication has been the substantial increase in the level of nutrients in the Lake. The source of nutrients can be traced unambiguously to the past construction in the Lake Tahoe basin. As natural soil gives way to asphalt and concrete,

the ability of the land in the basin to absorb water necessarily is reduced. The increased runoff sweeps along soil and the nutrients found in soil. These nutrients in turn allow plant life to flourish within the Lake, reducing its overall clarity. The ban against new construction is intended to prevent an acceleration of this cycle.

The record contains no evidence of any measures introduced by TRPA that require any alterations of sites that have already been built up. The building moratoria have at most prevented an increase in the rate of runoff, but have done nothing to reduce the level of runoff attributable to construction prior to the imposition of the development moratoria. All of the burden of preventing further eutrophication of Lake Tahoe has thus been cast on those landowners who did not have the need, foresight or luck to build on their properties prior to the formation of TRPA. The question addressed by this Court thus becomes whether that *selective* imposition of burdens on a temporary basis counts as a taking of private property for which compensation is required under the Takings Clause of the United States Constitution.

SUMMARY OF ARGUMENT

This case raises two distinct issues. First, does a temporary restriction on all development rights constitute a taking of private property for which *prima facie* just compensation should be paid? If (as is the case) this first question is answered in the affirmative, then, second, has TRPA offered any justification that negates its prima facie obligation? TRPA relies on two possible justifications: first, to protect the condition of Lake Tahoe from further degeneration, and, second, to allow some breathing room for planning agencies to engage in "normal delays in obtaining building permits, zoning ordinances and the like," mentioned but not elaborated in *First English*

Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987).

On the first question, the Ninth Circuit clearly erred when it gutted *First English* by holding that compensation is never required for any ordinance that from the outset purports only to impose temporary restrictions, even total restrictions, on land use. The Ninth Circuit offers no definition of how long a period of time counts as "temporary," save to say that temporary is shorter than permanent. Nor does it address the legal implications of repeated strategic, rolling and indefinite renewal of temporary restrictions. On its crabbed view, *First English* applies only when the state refuses to abandon an in-place permanent land use restriction after some court has declared it to be an uncompensated taking. As stated, the Ninth Circuit invites state agencies to engage in a wholesale evasion of the Takings Clause. On its view, if the state chooses to extend a "temporary" moratorium from ten to eleven years, it can do so without running afoul of the Takings Clause. But if a "permanent" ordinance is struck down after ten years of operation, then the state must pay compensation if it chooses to extend that ordinance's life for an eleventh year. The economic effects of these "temporary" and "permanent" ordinances are the same, but their constitutional consequences are polar opposites. Under the Ninth Circuit rule, states will find it all but irresistible to extend temporary ordinances rather than to cut back permanent ones. The correct view of the matter prevents this gutting of Fifth Amendment guarantees: any permanent or temporary restriction, however phrased or implemented, is every bit as compensable as the occupation of the land for the identical period of time.

Nor does TRPA have a police power justification for imposing the restriction without compensation. Here there is a genuine question as to whether paving over land within the basin counts as a nuisance. If not, then

the state has no justification for singling out these owners without compensating them for their losses. As all owners in the Lake Tahoe Basin benefit, all should have to share in the costs of keeping the Lake clear. Yet *even if* the paving over open land counts as a nuisance, as it well might, it does *not* follow that TRPA may saddle these plaintiffs with the full burden of its nuisance control measures. If new construction by the plaintiffs counts as a nuisance, then the existing homes, driveways and roads in the Tahoe basin necessarily count as *continuing* nuisances. Even if the state may expand its definition of nuisance law, it cannot selectively sanction the plaintiffs, who have as of yet done no wrong, while allowing the creators of the continuing nuisance to go scot-free. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960). TRPA's current practices represent a total breakdown of the political process by allowing local residents to put the entire burden of preserving Lake Tahoe on nonresident owners who are unable to protect their interests in the political process. *See Pennell v. San Jose*, 485 U.S. 1, 22 (1988) (Scalia, J.) (account of the weaknesses of the democratic politics in the context of rent control). Only the payment of compensation to the plaintiffs can equalize the burden of nuisance prevention between early and latecomers.

Nor can TRPA make out its second justification. The succession of development moratoria does not remotely resemble the "normal delays" needed to consider individual applications for permits and variances. Rather, it represents a comprehensive planning system that refuses to pass on individual applications at all. Even if these moratoria were covered, in this instance, the delays in question surely count as "excessive" and not "normal" in that there is no short-time period (e.g., one year) in which the administrative action must be completed.

ARGUMENT

I. The Various Issues in a Takings Case Must be Disentangled in order to Develop any Coherent Jurisprudence.

It has been widely agreed that few areas in constitutional law are as chaotic or ill defined as this Court's takings jurisprudence. This Court itself has frequently acknowledged that criticism in its own words. In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), sustaining New York City's landmark preservation ordinance, Justice Brennan wrote:

> While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960), this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require the economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. See *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962).

The doctrinal confusion in fact cuts deeper because in many other cases the embedded quotation from *Armstrong* has received the categorical endorsement that Justice Black intended for it to have. Thus in the case closest to this one, *First English*, for example, Justice Scalia exhibited no tolerance or philosophical despair about organizing the law under the Takings Clause by writing: "It is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a

whole.' " *First English*, 482 U.S. at 318-19 (quoting *Armstrong*). And some opinions have quoted both the categorical version of the rule in *Armstrong* and its qualified rewrite in *Penn Central*. *See Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2465-66 (2001).

The only way out of this jurisprudential quagmire lies in developing a unified approach to the Takings Clause that takes into account the two recurrent themes that have thus far stymied comprehensive judicial treatment. The *first* of these is to preserve the parity among regulated individuals so that a runaway political process does not place disproportionate burdens on a vulnerable subclass of the population. The *second*, in this context, is to guarantee that important environmental interests are not overlooked by an unthinking and overzealous protection of private property interests. The former generates the impulse for equal treatment; the latter explains the importance for singling out *all* wrongdoers for special treatment.

We believe that this Court will be able to reconcile these twin objectives only if it disaggregates the initial question (has the government taken private property?) from the police power question (does the state have an environmental justification for its action?) so that each issue in sequence can receive its proper analysis. This approach simply imitates in the Fifth Amendment context the common practice of analysis elsewhere. Private lawsuits routinely divide multiple factors that bear on litigation between those elements the plaintiff must raise as part of the prima facie case and those which the defendant may introduce by way of an affirmative defense, so that each issue receives its due weight. On this view it is important not to "anticipate defenses" in articulating the prima facie, or to muddle together issues that should be kept analytically and legally apart.

Similarly, the First Amendment law involving the protection of freedom of speech is rarely regarded to be as chaotic as the law under the Takings Clause, largely because this Court has followed the procedure set out above. It first asks whether any particular regulation, tax or restriction counts as a restriction on the freedom of speech, and then, if that answer is in the affirmative, whether the restriction in question is justified as a means to prevent violence, defamation, obscenity, etc. *See, e.g., Miller v. California*, 413 U.S. 15 (1973) (child pornography); *New York v. Ferber*, 458 U.S. 747 (1982) (same); *Young v. Am. Mini Theatres*, 427 U.S. 50 (1976) (neighborhood preservation); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (indecency); *Va. Pharmacy Bd. v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976) (consumer fraud); *Dennis v. United States*, 341 U.S. 494 (1951) (public morality, or to preserve and protect national security). Once these legitimate ends are specified, it can then be determined whether the remedies imposed sweep too wide for their intended purpose.

One reason why the Ninth Circuit went so far astray in the instant case is that it consciously muddled these sets of issues together. It thus started with a detailed account of the strong environmental interests in the case so as to create the illusion that these interests would have to be slighted if *any* compensation were paid to the plaintiffs for their inability to build on their land for over a twenty year period. Yet the temporary takings issue does not arise only in environmental contexts, for it can also occur in ordinary zoning, traffic control or antigrowth ordinances that have little or nothing to do with environmental issues. It therefore is ill advised to prejudice the discussion of the takings issue by making it appear as though the recognition of the government's prima facie obligation to compensate necessarily short changes the environmental concerns. It is the burden of this brief to

show how the disaggregation of the two matters clarifies the analysis, gives due interests to both, and, in this case at least, requires that some compensation be paid to the plaintiffs *in order* to give the environmental interests their full weight.

II. A Temporary Taking that Deprives any Landowner of All Viable Economic Use of the Land is Prima Facie Compensable under the Takings Clause of the Constitution.

A. The Takings Clause Protects All Valid Interests in Real Property that are Created and Recognized under State Law.

It is widely understood that the federal constitutional law under the Takings Clause does not define the property interests in land and other resources that it protects. Rather the definition of these property interests falls typically (copyright and patents are exceptions) in the province of state law. *See United States v. Powelson*, 319 U.S. 266, 279 (1943); *United States v. Causby*, 328 U.S. 256, 266 (1946); *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1001 (1984) (using state definitions of trade secrets). The dominant characteristic of English and American Law is its flexibility. The fundamental form of ownership under Anglo-American law is the fee simple absolute in possession that was traditionally seen as conferring on its owner rights that extend over all times from the bowels of the earth to the edges of heaven. (*Cujus est solum, ejus est usque ad coelum et ad inferos*, translated as whosoever owns the land, owns to the heavens and to the depths.) Putting aside the obvious qualifications for air rights, *see Causby*, 328 U.S. 256, this unitary fee simple interest is capable of division in a large (but not unlimited) number of ways. For these purposes, the simplest variations on the doctrine of estates illustrate the basic flexibility of Anglo-American property law. The private law allows

individuals to divide land over the plane of time, such that one person holds a life estate while a second holds a reversion or remainder, or one person holds a lease and the other a reversion or remainder. It is also possible to create "servitudes" (covering both easements and restrictive covenants) that give one landowner interests in or over the land of a neighbor. *See Restatement (Third) of Property, Servitudes* (Tentative Draft No. 5, 1995). For a defense of the unified approach, *see* Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. Cal. L. Rev. 1261 (1982).

So long as these interests are validly created under state law, they are protected under the Takings Clause. Suppose that the fee simple in Blackacre is worth $100,000, but is then divided by deed into a life estate worth $60,000 and a remainder interest worth $40,000. Everyone agrees that the government has to pay $100,000 if it condemns the land before it is divided into the life estate and remainder. Accordingly, it has to pay each holder for its respective interest after the division. It would be inconceivable that the Takings Clause could provide full compensation for the protection of the fee, but *no* protection to either the life tenant or the remainderman, or the tenant and his landlord, once the property is divided in accordance with the settled principles of state law. Rather, a landowner's ability to alienate and use property under state law is only preserved if the state pays each holder of an estate in land the value of his or her interest. *See Palazzolo*, 121 S. Ct. at 2463 (noting the importance of alienability of interests in land); *see also* Victor Goldberg, Thomas W. Merrill & Daniel Unumb, *Bargaining in the Shadow of Eminent Domain: Valuing and Apportioning Condemnation Awards Between Landlord and Tenant*, 34 UCLA L. Rev. 1083 (1987).

The same analysis of divided property applies when the government takes part of the landowner's undivided

fee interest in land. In *Causby*, the question before this Court was whether the United States had to pay for the damages caused to plaintiffs' property by repeated low-level overflights. In allowing the action, the Court recognized that the overflights took an *easement* over the plaintiff's property, for which it was required to pay not only for the space so occupied but also for all the consequential damages done to the plaintiff's *remaining* land holdings. The government sought to limit damages because the

> "enjoyment and use of the land are not completely destroyed. But that does not seem to us to be controlling. The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain. But the use of the airspace immediately above the land would limit the utility of the land and cause a diminution in its value." *Causby*, 328 U.S. at 262.

No requirement of a total wipeout, anywhere. The landowner does not receive protection only in the event that the fee simple is taken away root and branch. He receives protection for the taking or destruction of any fractional interest. "It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken." *Id.* at 261, *cited in First English*, 482 U.S. at 319.

The principle that applies to easements applies with equal force to term interests in property. In *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949) (Frankfurter, J.), the government had requisitioned property for government use for an indefinite period during the second World War. The occupation of the property was both temporary and indefinite, but neither of these factors alone, nor in combination, denied the owner of the property compensation for the rental value during the period

of government occupation.[2] The government had the option to decide whether to take the property over in a single transaction, or to extend its occupation day by day. It chose the latter because of the uncertain duration of the war. But this power to determine the scope of its taking did nothing to defeat its obligation to compensate.

Kimball Laundry and its companion temporary takings cases, *see United States v. Petty Motor Corp.*, 327 U.S. 372 (1946); *United States v. Gen. Motors Corp.*, 323 U.S. 373 (1945), were explicitly relied on in *First English* to justify the state's prima facie duty to compensate when government regulation restricted all right to use the property for a limited period of time. That judgment was simply an extension of the familiar equivalence in this Court's jurisprudence whereby compensation is required for any government restriction that precludes all economically viable use of the property in question. *See Lucas v. S.C. Coastal Çomm'n*, 505 U.S. 1003, 1015-16 (1992). In dealing with the fee simple, this Court has refused to draw any distinction between a total restriction on land use and a government occupation. *First English* preserved that equivalence for temporary periods of use.

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[2] The decision also refused to compensate the lessee for the loss of good will attributable to the government occupation on the grounds that this was only destroyed but not taken by the state. That conclusion seems flatly wrong as a matter of principle, if only because good will is itself a recognized form of property under state law. The mere fact that it was "destroyed" but not "taken" does not distinguish the case from *Causby*, which clearly did allow for consequential damages.

B. The Ninth Circuit's Continued Attempts to Evade the Command of First English are Unavailing.

The Ninth Circuit invoked a number of dubious stratagems in order to resist the clear direction of *First English*. Its first line was to note that *First English* itself asks the question "whether abandonment by the government [of a regulation declared to be a taking of the fee simple] requires payment of compensation for the period of time during which regulations deny a landowner all use of his land." 304 U.S. at 318, *quoted in Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 778 (2000). From this articulation of the question, the Ninth Circuit then concluded that *First English* does not apply here because TRPA had never imposed a permanent moratorium on development for it to abandon.

The fatal flaw in the Ninth's Circuit reasoning lies in its undue stress on the particular fact pattern in *First English* while neglecting its basic message. The loss to the landowner is, as a first approximation, the same whether the restriction in question was initially imposed for a definite period of time or as a permanent regulation. A temporary regulation creates residual uncertainty because it can be extended. A permanent restriction leaves a residual uncertainty because it can be lifted. But either way the interim loss of use values remain the same, and so too the uncertainty imposed on the private ability to plan. The difference between the two systems of land use regulation is no greater than the ephemeral difference between a bonus for early payment or a penalty for later payment, when in each case the former costs $90 and the latter $100.

The government occupations of land in *Kimball Laundry*, *Petty Motor*, and *General Motors* were also all temporary from the outset, but that hardly made them noncompensable. Only the mode of payment changed, for

the government-as-tenant paid rent on a periodic basis for the period of use instead of a single lump sum. Nothing about the difference between physical occupation and economic regulation limits *First English* to abandonment cases. Thus in *Lucas*, Justice Scalia matter of factly described *First English* as "holding that temporary deprivations of use are compensable under the Takings Clause." And so it does.

The Ninth Circuit sought to add a philosophical patina to bolster its conclusion by noting that the alternative view of the matter requires the Court to engage in what has been termed a "conceptual severance" of the fee simple into its component parts. *See* Margaret Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Colum. L. Rev. 1667, 1674-78 (1988). The basic argument is that the plaintiff seeks to "sever," at least in theory, the present from the future interest, so that it becomes "the" property subject to a taking by the state.

This hypothetical severance – no plaintiff in this case actually sought to divide his property over time – receives heightened but undeserved attention only because this Court's case law makes the question of compensation turn on the comparison between the quantum of the interest the state takes and the quantum of interest the landowner held prior to the regulation. Compensation is awarded when the entire interest is taken, but not when the landowner retains enough to continue to make viable use of "the" property.

This before-and-after comparison received its most important judicial expression in *Penn Central*, when this Court held that the plaintiffs were not entitled to recover for the loss in value of the air rights over Grand Central Station imposed by New York City's landmark preservation program. Justice Brennan held that the air rights had to be treated as part and parcel of the fee simple for the

entire plot by declaring, without explanation, that "[t]akings jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." 438 U.S. at 117-18. What matters is the disposition of the "parcel as a whole," in that case the entire landmark site. *Id.* Hence so long as Penn Central could continue to undertake all preexisting uses at a profit, as by the continued operation of its terminal, it could not show that it had been deprived of all economic use of the parcel in question. If, however, it could treat the air rights as though they had been sold off to a third party, thus forming a separate item of property (as they would be under state law), then compensation would be required because these (narrowly defined) air rights would have lost their entire use value, even if the use of the Grand Central Station, conceived separately, remained unchanged.

The need to define the contours of the property subject to regulation is often referred to as the "denominator" problem. *Keystone Bituminous Coal Ass'n v. deBenedictis*, 480 U.S. 470, 497 (1987) (citing Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1192 (1967)). Once it is known what is lost, then it is important to determine whether it is "the" property or part of a larger whole for which it counts as a smaller fraction. The Ninth Circuit's belief was that the fee simple sets the denominator, for which the temporary life estate counts only as a small fraction. It thus extended the *Penn Central* rule for spatial segmentation to temporal segmentation.

The errors in this position are numerous. We have set many of these out in our previous amicus curiae brief in *Palazzolo v. State of Rhode Island*, at 26-30, and will not repeat all the nightmarish problems that arise when the

government seeks to amalgamate several undeveloped parcels into a single whole to take advantage of the *Penn Central* rule. It is important to note in this context, however, that the Ninth Circuit sugarcoats the matter by claiming the taking is temporary so the associated loss is small, such that once the temporary restriction is over the landowner can go about his business. The obvious rejoinder is that the financial deprivation is a function of both the value of the underlying property and the duration of the temporary restrictions. The general rules of discounting, as applied to land valuation, make it crystal clear that the loss of the use of land today cuts much more deeply than the like loss of the use of the land twenty years from now. Take a plot of land worth $100,000. With a discount rate of 3 percent per year, then a three year moratorium reduces the value of the property by at least $9,000; the twenty year moratorium reduces its value by $46,000; raise the discount rate to 4 percent, and those numbers become about $12,500 for the three year deprivation and about $53,000 for the twenty year deprivation. Even these calculations understate the risk to the landowner. Uncertain delays make it harder to plan the ultimate development of the land, and expose the owner to the costs of litigation that are nowhere compensated under the law.

Nor is the argument against compensation strengthened by noting that a proper analysis of the Takings Clause should guard against strategic behavior – acting inconsistently with one's true preferences in order to obtain some short-term collateral advantage. *See Palazzolo*, 121 S. Ct. at 2477-78 (Breyer, J., dissenting). The ostensible concern is that landowners might consciously divide their holdings in order to increase the odds of getting compensation from the state. Yet nothing of that sort happened here at all, for *none* of the 400 plus plaintiffs in this case have made a temporal division of their

land to bolster the claim that some retained term interest was "the" entire property.

Strategic behavior is, moreover, a two-edged sword. This Court struck down the effort of Rhode Island to engage in strategic behavior by announcing its wetlands restrictions before Palazzolo acquired his property, in an involuntary distribution no less. *See Palazzolo*, 121 S. Ct. at 2462-64. Similarly, in this case, the party trying to game the legal system is TRPA. It knows that it cannot declare a permanent moratorium on new development without having to pay compensation under the Takings Clause, so it has for twenty years engaged in its own actual regulatory severance by imposing a bewildering succession of temporary moratoria. It was just this dreadful prospect that led the Court in *First English not* to follow the principle for spatial segmentation that was laid out in *Penn Central*, and nothing in the last fourteen years should lead this Court to deviate from this result.

More generally, the only possible way to deal with the dangers of strategic behavior on all sides is to follow the rule that requires the state to pay full value to the party who holds the interest at the time of the condemnation. To return to *Penn Central*, suppose that the air rights had been sold off years before New York announced its landmark preservation ordinance. Does one treat the prior sale as though it were strategic, and deny compensation to the holder of the air rights because the Penn Central Company can still make use of Grand Central Station? That rule places a powerful crimp on the ordinary alienation of land by leaving the buyer defenseless against future regulation. As noted earlier, the compensation owed by the state should neither increase nor decrease, solely because the air rights have been transferred when the ground rights have been retained. The right result can only be achieved if the air rights receive full compensation whether they are linked to or severed

from the ground rights. Under that rule, the only time that the owner of the fee will sell the air rights is if they are worth more (after transactions costs) to the buyer than they were to himself – a value-maximizing transaction that the law wishes to protect. The concern of conceptual severance is, ironically, correct to the extent that it counsels that private parties should have no incentive to rearrange property rights solely to up the level of compensation received. But that result is achieved only if the property interest is fully compensated whether the interest is retained or rejected.

Penn Central is not only wrongly decided, we believe, but it also stands, as the Ninth Circuit rightly perceived, in mortal tension with both *First English* and such earlier cases as *Causby* and *Kimball Laundry*. The most glaring anomaly in the law of takings generally is why this Court should treat the tiniest physical occupation as a categorical taking generating a well-nigh per se obligation to compensate, *see Loretto v. TelePrompter*, 458 U.S. 419 (1982), while land use restrictions that devastate the value of property are judged by a far less restrictive standard. It cannot be unraveled by overturning *Loretto*, for then the Takings Clause becomes a dead letter. But the anomaly can be extirpated by overturning *Penn Central*, so that the greater the government intrusion, be it by taking or regulation, the greater the presumptive obligation to pay.

Overturning *Penn Central* brings the Takings Clause into harmony with the private law of property, where the distinction between physical occupation and land use restrictions has no resonance. There both easements, which authorize entries that would otherwise count as trespasses, and restrictive covenants, that render unlawful otherwise permissible uses, are treated as property interests. These interests are both subject to recordation; they run with the land, and they afford their owners both

monetary and injunctive relief; and they are both protected against state condemnation. So long as federal takings law takes its cue from the state law of private property, the categorical distinction that *Penn Central* seeks to erect between easements (that invade) and covenants (that restrict) land use cannot be justified by insisting, falsely, that the level of dislocation from the government action is greater with the physical occupation of a tiny corner of one's property for a day than for a comprehensive moratorium that lasts for years.

Nor is there any intelligible way to rank permanent partial restrictions on land use (e.g., zoning restrictions) as either more, or less, severe temporary total restrictions, such as those found here and in *First English*. It all depends on the facts. Sometimes the partial permanent restriction will bite more deeply into the landowner's common law rights than the total temporary restriction, and sometimes not. This Court's recent decision in *Palazzolo* noted the intellectual "discomfort" with the entire denominator conception. 121 S. Ct. at 2465. The time has come for removing the discomfort by transforming the analysis. The key to understanding the overall problem lies in the general approach of *First English*, namely, that in takings cases what matters is the interest that is taken, not that is retained by the owner. The size of the original bundle of rights is neither here nor there, unless it can be shown that the taking of one portion of the land serves to increase (as by access to a new public road) or decrease (as by noise or pollution) the value of what is retained.

Justice Stevens in his *First English* dissent noted that property can be measured over three dimensions, space, use and duration. *See First English*, 482 U.S. at 330, *paraphrased in Tahoe-Sierra*, 216 F.3d at 764. *See also* Judge Kozinski's dissent of the denial of the en banc petition for rehearing. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 228 F.3d 998, 999 (9th Cir. 2001) (noting

that the Ninth Circuit rejected sub silento *First English*). The *only* correct inference to draw from his observation is that *any* diminution along *any* dimension of ownership is prima facie compensable. That position does *not* entail that any change in market value attributable to changes in the local environment is subject to compensation. It only implies that whenever the state *takes* a stick from the bundle of rights, it should compensate for the loss unless it can show some justification for its action.

The stakes here are high. The consistent application of this position would require overturning the outcome in *Penn Central* to the extent that it held that the loss of air rights did not give rise to a prima facie right of compensation. Yet that result would be welcome because it would end the discontinuity between that case on the one hand, and *First English, Kimball Laundry* and *Causby* on the other. Overruling *Penn Central* on this point, as a selective imposition of an improper system of "spot zoning" removes the disproportionate impact on isolated owners in manner as Justice Black's maxim in *Armstrong* requires. *All* partial takings by way of land use restriction should be subject to the same prima facie rules for compensation as a physical occupation for a limited period of time. The *First English* case held that for temporary total takings. At the very least, nothing in *Penn Central* diminishes *First English*'s continued vitality. And *First English*'s vitality calls for overruling *Penn Central*.

III. The Police Power Justifications for the State, While Present in this Case, do not Justify a Disproportionate Burden on These Plaintiffs.

A. This Case Raises Police Power Issues Dramatically Different From Those in First English.

Thus far this brief has argued that the temporary total land use restrictions in this case should be regarded

as prima facie compensable under the *First English* rule. The question then arises whether the state can justify the restriction in question. This issue also arose in *First English* itself, where the state claimed public health and safety justifications for preventing the rebuilding of the flooded land. The plaintiff in that case sought to parry the force of this argument by alleging that the initial flooding had resulted from government policies that created dangerous conditions on upstream waters. *See First English*, 482 U.S. at 308. But once that tort claim was rejected as resting on what was adjudged an untenable strict liability theory in tort, *id.* at 309 n.3, then little was left to the plaintiff's case. On remand, the California Appellate Court treated the flooding as caused by an act of God, and accordingly had little difficulty in holding the County justified in preventing the reconstruction of the facility to protect disabled children who might use it. *First English Evangelical Lutheran Church v. County of Los Angeles*, 258 Cal. Rptr. 893, 210 Cal. App. 3d 1353 (1989). *First English* thus never raised the question of whether the plaintiff's conduct could be restricted on the grounds that it created a nuisance that could harm others.

This case presents radically different issues. No one could claim that any restrictions on new construction are necessary to protect the lives of the prospective occupants. Rather, the entire case turns on the question of whether the construction of additional homes would create a nuisance to public waters. In allowing plaintiffs some recovery, the District Court relied on decisions of California courts that held that the tort of nuisance required an actual *discharge* of waste or harmful substances by the plaintiff onto public lands or waters or the private lands and waters of others. *See* Appendix to Petition for Certiorari at 120-26 (citing, e.g., *Joerger v. Pac. Gas & Elec. Co.*, 207 Cal. 8, 276 P. 1017, 1025 (Cal. 1929)).

No one questions that cases of discharge, especially of filthy or noxious substances, count as the core cases of nuisances that can be enjoined, without compensation, under the state police power. Here, if *one* person is solely responsible for the discharge, the law *should* come down on the perpetrator alone, so that it would be grotesque to allow him to claim that he has been singled out for special treatment in violation of the *Armstrong* principle. He has singled out himself for the harsher treatment that he deservedly receives.

The instant case, however, differs from the canonical nuisance cases cited below in two ways. First, it does not involve any discharge of waste materials into public waters. Rather, it asks whether the defendant has created a nuisance by paving over the land, without discharging any substances into public waters. Second, the following question arises whether or not this broad account of nuisance is adopted: *which* of the many individuals who have built, or might build, in the Tahoe basin should bear the responsibility for the improvement of the condition of Lake Tahoe? The District Court focused exclusively on the first, and could not find any California precedent that extended the idea of nuisance to cover this case. It then followed the instructions of *Lucas*, which stated:

> we believe similar treatment must be accorded confiscatory regulations, *i.e.* regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership. *Lucas*, 505 U.S. at 1029.

Lucas then continued:

> The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so), see [Restatement (Second) of Torts], § 827, Comment *g*. So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant." *Lucas*, at 1031.

The District Court found only one long-term statutory provision that met these requirements, the state's statutory definition of a nuisance,[3] which by any fair reading does not appear, as it concluded, to cover the situation presented here. But as a matter of tort theory the District Court's conclusion of no nuisance is not ironclad, for a respectable case could be made for the proposition that the paving and building over the ground should, in light of the external harms (none of which were alleged or plausible in *Lucas*), be treated like a nuisance, subject to the state police power. Arguably, the situation comes quite close to the general rule in *Rylands v. Fletcher*, L.R. 3 H.L. 330 (H.L.E. 1868), which holds a party liable for harm caused when substances a landowner "brings, keeps or collects" on his own land escape. To be sure, no homeowner has captured water in a reservoir that leaks. But some weight could be properly

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[3] "Anything which is injurious to health . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal or basin, or any public park, square, street or highway, is a nuisance." Cal. Civ. Code § 3479, *quoted in* Appendix to Petition for Certiorari at 120. For the analogous provision, *see* N.R.S. 40.140(1), *quoted in* Appendix at 125.

attached to the decision of any landowner – public or private – paving over open land so as to divert water that would otherwise be collected or absorbed onto the plaintiff's land in ways that do harm. That rule would substantially extend liability as it is currently found virtually everywhere in the United States, for leaking reservoirs are something of a rarity, but asphalt highways and driveways are not. It is difficult to hazard a guess in the abstract as to what kind of ordinance or liability rule regulating paving and similar activities should pass muster under the police power, when state actions are examined, as we believe they should be, under an intermediate standard of scrutiny. But in our view, there is surely a substantial possibility that the state could remain within the confines of "background" common law principles, as construed in *Armstrong* and *Lucas*, by adopting a general rule of tort liability for these activities, or by imposing well-tailored nondiscriminatory administrative limitations on this conduct.

B. Whether or not Paving Over Open Lands Constitutes a Nuisance, these Plaintiffs Should not be Required to Bear the Full Costs of Protecting Lake Tahoe without Receiving Just Compensation.

The uncertainty in the definition of a nuisance only addresses one part of the *Lucas* police power analysis, which to our knowledge has never been systematically applied to cases of joint behavior by multiple landowners. In the case where the state seeks to enjoin one landowner from certain activities, the question of whether his activity rises to a level of a nuisance becomes decisive under *Lucas*. Fortunately, in the context of joint activities, it is no longer necessary to decide whether state common law or statutes have, or should, extend their conception of nuisance law. Somewhat surprisingly,

in this context of multiple independent landowners, compensation is required in both cases to counteract, as *Armstrong* and *Lucas* require, the disproportionate impact of state regulation on *similarly situated individuals* that *Lucas* condemns. The gist of the matter here is that these plaintiffs are denied the identical uses allowed to other parties who have been fortunate enough to build on their sites before TRPA passed its restrictive legislation. In line with *Armstrong* some adjustments must be made to rectify the injustice of forcing one class of innocent owners to bear the entire burden of those precautions introduced in order to protect the water quality of Lake Tahoe from further degradation, even if their activities fall into the nuisance category. It is therefore useful to analyze the police power of TRPA's state first on the assumption that paving over natural terrain does not constitute a nuisance, and then on the assumption that it does.

To structure the analysis, begin with a simplified model in which 100 identical plots of land surround Lake Tahoe. Assume further that construction on any given plot of land increases the runoff and thus reduces the water quality in the Lake, but does *not* constitute a nuisance. In principle the social objective for this community is to allow construction until the marginal social cost of building on an additional plot, including the overall negative impact on the Lake, is greater than the marginal benefit from that additional construction. In the absence of regulation, each landowner will tend to ignore the decrement that his construction will have on the quality of the Lake. In the early stages, these costs may well be low so that the construction makes sense from a social point of view. But the harm is likely to increase with each additional unit constructed, so that we can reach some maximum level of permissible construction. That judgment rests on a mixture of political and scientific considerations sorted out by legislative or administrative

determination. Solely for the purposes of exposition, we assume that it allows for the construction of single-family homes on 60 percent of the plots.[4]

In a world in which no one has undertaken any construction, the best method for development is to auction off the building rights so that they go to those who value them most, and then to divide the total proceeds received among those individuals who are denied the right to build. That system allows for (1) the optimal level of construction as determined by environmental considerations, (2) the efficient selection of the sites on which construction takes place, and (3) compensation to the nonbuilders who therefore are spared disproportionate impact. The bidding system thus allows for both the equitable division of the burden and for a full realization of the environmental interests. It also conforms with the dicta in *Lucas* that call for compensation when one group of individuals is denied the development rights granted those who are similarly situated.

In this case, however, some of the units have been built before restrictions have been put in place. It is no longer possible to adopt a bidding system to allocate the development rights where they are valued the most. But it is possible to require the side payments to the extent that TRPA now decides by fiat to impose the entire burden of environmental protection on those individuals who have yet to build so that local residents can continue to enjoy the beauty of the Lake. The correct solution therefore is to impose a tax on those who have developed their lands to compensate the others for the loss of their development rights, be they great or small. If it is argued

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[4] Ironically, a better approach might well call for the construction of some multi-family dwellings, which would reduce the level of ground covered for each new resident. We put such complications aside here.

that the benefits of preserving Lake Tahoe extend beyond its immediate users, then the states of California and Nevada could chip in some additional funds to reduce the burdens on local residents who have already built. This regime will force current homeowners (and the two states) to decide just how much they value the purity of Lake Tahoe because now they must pay for whatever benefits they receive. We thus have a system that respects environmental objectives without imposing undue burdens on a select and vulnerable portion of the population. This system is far preferable to one that allows the dominant faction to keep all the benefits of their own homes while denying all other landowners, without compensation, the prospect of building at all.

Now suppose, however, that the plaintiffs would have created a nuisance by paving over their open land. It still follows that they should be compensated for keeping their lands open. Once the definition of nuisance is expanded to catch the plaintiffs, then it has to be expanded, in line with *Armstrong* and *Lucas*, across the board. Accordingly, it follows that all existing owners of built-up land have committed continuing nuisances that have caused harm to Lake Tahoe, and will be allowed to wreak damage without limitation in the future. The question then arises, what should be the fair allocation of burden among these parties. According to TRPA, *all* of the burden of precautions should be cast upon the plaintiffs, even though *all* the previous damages have been caused by the established homeowners within the area. The adoption of this one-sided rule invites unwanted strategic behavior by encouraging premature (and harmful) development of land in order to gain a priority over one's neighbor. Of course, it may be costly and counterproductive to rip down one house in order to build another. That said, the appropriate remedy is to tax those

individuals who have, by hypothesis, committed nuisances in order to pay the compensation that equalizes the burden between them and their neighbors.

Some differences still remain between the nuisance and the nonnuisance scenarios, but they do not go to the compensation question. Thus if all defendants have committed a nuisance, then there is less warrant for asking California and Nevada to contribute funds raised from general revenues to ameliorate the danger. All of the burden could be placed on those homeowners responsible for the damages. Similarly, if a single landowner held title to all the land around the basin, then under *Lucas*, TRPA could enjoin his operations without the payment of compensation if that activity were adjudged a nuisance, but not if it were found to be a lawful use of property. It follows therefore that even the most systematic exposition of takings law leaves some hard cases close to the edge of the police power, for just as there are borderline cases under the private law of nuisance, so too are there under the police power that is parasitic on these private law conceptions. But none of those complications matter in this case, for whether we treat new construction as lawful or tortious, there is no warrant favoring those who have done everything to create and nothing to abate the condition in question. Compensation should therefore be paid to these plaintiffs for their loss.

IV. The Need for Orderly Planning does not Justify the Endless Delays Imposed in this Case.

The only issue that remains for discussion is the scope of *First English*'s observation that its holding did "not deal with the quite different questions that would arise in the case of normal delays in obtaining permits, changes in zoning ordinances, variances, and the like." 482 U.S. at 321. Initially, nothing in *First English* covered

temporary moratoria, and that upholding any constitutional claim against government necessarily limits the reach of government discretion. *Id.* at 321-22. Nor is it improper to clip the wings of planning authorities. These groups respond to the pressures of local residents, not those absentee landowners who do not vote in local elections. Strategic delay allows the locals to achieve their goal without paying their way. The dangers of faction and bias can only be countered by giving the outsiders the protection of a nondiscrimination rule (similar to that adopted in this Court's dormant commerce clause jurisprudence) to offset the outcomes of political processes in which they do not fully participate. Here the plaintiffs do not ask for any special treatment; they only do not want to be subject to discrimination that favors those privileged homeowners as against themselves. The disproportionate impact test does not tell the local powers how much environmental protection to demand. It only tells them that they cannot cast the entire burden of protection on a select group of individuals who have yet to build at all.

This entire scheme of checks and balances would be undercut if planning authorities could cloak their decisions to exclude in endless deliberations and reviews. The use of the term "normal" delays in *First English* shows that this Court was alert to the possibilities of abuse. Drawing the line between normal and excessive deliberation is, however, a daunting task. This problem is not acute when all the parties to the dispute are similarly situated, for then each shares a pro rata portion of benefits and costs. But in cases like the present, where the distribution of benefits and burdens is manifestly skewed, everyone knows that delay works for the benefit of one group and one group only. Accordingly, when the current positions are so skewed, the best result is to

require periodic compensation to those bound by temporary restrictions along the lines of *Kimball Laundry*. Once the regulations are finalized then a more complete reckoning is possible.

In the alternative, if this privilege is recognized even when the burdens of its implementation are skewed, then it should be strictly limited. Tests that balance one factor against another are not worth the candle, and invite endless rounds of litigation on collateral issues. The better approach by far is to allow a short fixed period for deliberations to take place without compensation – say, maximum one year – after which the just compensation requirements under the disproportionate impact test should kick in as described above. This case goes so far beyond the pale that no matter what the ultimate rule going forward, the defendants should not receive any protection under it in this case.

CONCLUSION

For the reasons stated above, the decision of the Ninth Circuit should be reversed, and the case remanded for a determination of the level of just compensation owing to the plaintiffs for the temporary taking of their lands.

Respectfully submitted,

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